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No. 79-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

I.

POLICY ARGUMENTS OF RESPONDENT AND *AMICI CURIAE* DO NOT SUPPORT THE EXCLUSION OF RULE 68 FROM TITLE VII CASES.

Delta submits that, when read together, Respondent and the various opposing *amici*[1] would have this Court abrogate the

[1] Citations to "Pet. Br." refer to the Brief for the Petitioner. Citations to "EEAC Br." refer to the Brief of the Equal Employment

(Footnote continued on following page)

operation of Rule 68 in all Title VII litigation.[2] Respondent, *amici* the United States and EEOC, and *amicus* Lawyers'

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Advisory Council as Amicus Curiae. Citations to "Resp. Br." refer to the Brief for the Respondent. Citations to "Gov't. Br." refer to the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae. Citations to "NAACP Br." refer to the Brief for the National Association for the Advancement of Colored People as Amicus Curiae. Citations to "ACLU Br." refer to the Brief for the American Civil Liberties Union as Amicus Curiae. Citations to "LCCR I Br." refer to the Brief of the Lawyers' Committee for Civil Rights Under Law, Washington, D.C. branch as Amicus Curiae. Citations to "LCCR II Br." refer to the Brief of the Lawyers' Committee for Civil Rights Under Law, Chicago branch as Amicus Curiae. Citations to "NWLC Br." refer to the Brief for the Northwest Women's Law Center as Amicus Curiae.

[2] Delta additionally notes that Respondent, *amici* United States and EEOC, and *amicus* Lawyers' Committee I have included in their briefs the following misleading, irrelevant and/or wholly unsupported statements which should be excised by this Court:

Resp. Br.

> "Here in a case involving an individual claim, Delta ran up what Ms. August estimates to be at least $10,000 in costs." (p.6)
>
> "This figure is based on approximately $6,000 in costs incurred by Ms. August at trial, recognizing Ms. August's second copy of Delta's "same day" and "next day" order of Transcript and Delta's $2,300 in costs on appeal." (p.6, n.1)
>
> "Ms. August's employment record was not substantially dissimilar from that of many of her co-workers. Nonetheless, during her employ with Delta she was singled out in a variety of ways. She was required to have a medical examination for venereal disease, she was suspended for seven days for serving a tepid cup of coffee despite the conclusion of her supervisor that the complaint was unjustified and her supervisor noted in a file review that she "should be watched." (p.7)

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> "It is of interest to note that Delta has made precisely the same purported offer of judgment in the amount of $450 in a subsequent Title VII case." (p. 13, n.3)
>
> "Following her discharge, Ms. August, not unlike other such plaintiffs, was unable to obtain similar employment. At best she found intermittent jobs as a sales person. At the time of trial she was unemployed. Ms. August had lost her health benefits which were significant to her because of a chronic illness. She also had lost a number of other benefits which either she could not afford or it was impossible to replace. Her only hope to recoup her financial losses and remove the tarnish on her employment record, was to bring a Title VII lawsuit to win back what she felt had been unjustly denied her." (p.20)

Gov't Br.

> "We have been informed by respondent's counsel that she had spent 39 hours on this case by May 12, 1977, and that her billing rate is $50 per hour. At the time of petitioner's offer, therefore, respondent's attorneys' fees could have been as much as $1,950." (p.4 n.3)
>
> "[S]he is an unemployed airline stewardess for whom even her own costs of litigation represent a considerable burden, and petitioner is clearly able to absorb its own costs." (p.9)
>
> "In fact, it appears that her accrued costs, including attorneys' fees, substantially exceeded the amount of the offer (see note 3, *supra*);" (p.15)
>
> "She reasonably declined petitioner's offer of $450 including attorneys' fees, made at a point in litigation when she had incurred attorneys' fees well above that amount." (p.26)
>
> "Although the court did not make express findings with respect to its costs determination, the court was obviously aware that respondent is an unemployed airline stewardess who pursued nonfrivolous, although unsuccessful, claims; that her rejection of petitioner's offer of judgment was not unreasonable; that she is without significant financial means and must already pay her own litigation expenses to the extent that she is able to do so; that the costs are large; and

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Committee I argue that prevailing defendants cannot use Rule 68 to recover litigation costs (Resp. Br. at 14-19; Gov't Br. at 11; LCCR I Br. at 7). *Amicus* Lawyers' Committee II and Respondent make the further argument that in cases where Rule 68 does apply (presumedly only in cases where plaintiff prevails but in a lesser amount than offered), that its application is not mandatory but discretionary (Resp. Br. at 19-22; LCCR II Br. at 37). Finally *amicus* NAACP urges that Rule 68 should not apply even where a prevailing plaintiff has previously spurned an offer more favorable than the ultimate judgment. (NAACP Br. at 8-10).

Implicit in these arguments against the use of Rule 68 in Title VII cases is the conclusion that Title VII plaintiffs are so favored under public policy that they may engage in cost-free litigation, provided only that such litigation not be frivolous, unreasonable or groundless. Delta submits that such a result is consonant with neither the policies underlying Rule 68 nor Title VII and should be rejected.

(Footnote continued from preceding page)

> that it would not be oppressive for petitioner to absorb its own litigation costs." (p.28)

LCCR I Br.

> "They must also have been aware that she was an unemployed stewardess without financial resources who had to bear her own litigation costs." (p.6 n.2)

We submit that the above quoted statements constitute an affront to this Court and an abuse of the privilege of appearing before this Court. The creation or fabrication of emotionally charged arguments have no legal justification.

A.

Title VII Plaintiffs Will Not Be "Chilled" By A Mandatory Operation Of Rule 68

The argument (Resp. Br. at 5; Gov't. Br. at 23; J.A. A6) which suggests that a mandatory application of Rule 68 will have a chilling effect on Title VII plaintiffs is not persuasive. Presently, numerous incentives exist for plaintiffs to sue under Title VII. A prevailing plaintiff is awarded both costs and attorney's fees pursuant to § 706(k) of the Civil Rights Act of 1964, as amended, in all but "special circumstances". *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). Further, a plaintiff may receive an award of attorney's fees for administrative proceedings. *New York Gaslight Club, Inc.* v. *Carey*, 48 U.S.L.W. 4645 (U.S. June 9, 1980.) Moreover, certain bonuses for plaintiff's attorneys have become acceptable practice. *See, e.g. Copeland* v. *Marshall*, ____F.2d ____, 23 Fair Empl. Prac. Cases 967, 975 (D.C. Cir. 1980); *Parker* v. *Califano*, 443 F.Supp. 789, 793-94 (D.D.C. 1978)

While providing incentives for plaintiffs to sue, Congress and this Court have heretofore acknowledged that there must be an accommodation of competing considerations to effectuate the continuing policy that a fair adversary process requires both a vigorous prosecution and a vigorous defense. *Christiansburg Garment Co., supra* at 419. Thus even if there were no Rule 68, a Title VII plaintiff would know, in light of *Christiansburg*, that to pursue a frivolous, unreasonable or groundless claim would result in an award of defendant's attorney's fees. Further, and of more compelling significance in the instant case, a plaintiff should know the presumption under Federal Rule 54(d) that a losing plaintiff will have to pay all litigation costs.

Certainly the mandatory operation of Rule 68 does not increase the risks presently inherent in Title VII litigation. If Rule 68 creates a "chilling effect" which compels its abrogation,

then § 706(k), Rule 54(d) and this Court's *Christiansburg* decision all need to be jettisoned for they are similarly "chilling".

B.

The Mandatory Application Of Rule 68 Promotes Settlement

There is apparently no dispute among the parties, *amici* and the lower courts that the principal reason for Rule 68's existence is to promote settlement (Resp. Br. at 5; Gov't Br. at 10; J.A. A5, A11).

Delta submits that the most effective means of promoting settlement and reducing litigation is a mandatory application of Rule 68. Such an approach requires that each party realistically evaluate its respective case. A defendant who underestimates its exposure gains nothing by the utilization of an offer of judgment. Likewise, a plaintiff who persists in litigating a claim after an offer has been made is put on notice that litigation costs will be assessed if the ultimate judgment does not exceed the settlement offer. Only by knowing, with certainty, what consequences will obtain by an unrealistic assessment, will parties be compelled to evaluate their claims realistically. Neither the Seventh Circuit's amorphous standard (J.A. A7), nor the *amici* Government's "reasonableness" standard (Gov't Br. at 24), nor Respondent's "discretionary" standard (Resp. Br. at 22), nor the *amicus* Lawyers Committee I "genuineness" standard (LCCR I Br. at 7) for the application of Rule 68 promotes settlement. To the contrary, each creates more uncertainty in the evaluative process, both for the parties and for the trial judge. Thus, what is a "reasonable" or "genuine" amount for the defendant to offer when in fact the plaintiff is entitled to nothing? Is it a function of the prayer for relief, or the abilities of opposing counsel that should determine reasonableness or

genuineness? Does it depend on the size or profitability of the defendant, or the wealth of the plaintiff? Does a claim known by defendant to have no merit become more valuable with the mere passage of time, or because plaintiff's counsel engages in lengthy, but unproductive discovery efforts?

Delta's proffered standard for Rule 68 is simple, certain and fair. It protects only the defendant who offers to have judgment taken against it in an amount in excess of that which plaintiff ultimately receives. Furthermore, in the context of settlement, the use of Rule 68 is not "cheap insurance". (See J.A. A5; Resp. Br. at 21; LCCR II Br. at 22).[3] Unlike most customary forms of settlement, a defendant utilizing Rule 68 does not receive a non-admission clause.[4] Instead, such a defendant receives a judgment entered against it, finding it liable for having discriminated.

C.

Meritless Cases Need No Encouragement

Delta concludes (Pet. Br. at 17), as have Congress and this Court, that meritless Title VII cases need no encouragement. *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978). Concomitant with this policy is the desirability of avoiding the proliferation of lawsuits, particularly marginal suits with little likelihood of success. A mandatory application and interpretation of Rule 68 is entirely consistent with this policy.

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[3] Insurance against hurricanes in Chicago may well be "cheap", as compared with similar insurance along the Gulf Coast. This Court may take judicial notice of the fact that insurance premiums, like settlement offers, depend upon the degree of risk and exposure involved.

[4] *See, e.g. Maher* v. *Gagne*, 48 U.S.L.W. 4891, 4892 n.8 (U.S. June 25, 1980); *see also* Standard EEOC Settlement Agreement form, reprinted in the Appendix to this brief. (Pet. Reply Br. App. at 16a-17a).

Without such an approach, the balance between a plaintiff's incentives to sue and a defendant's right to be free from at least its litigation costs when it utilizes Rule 68 becomes skewed. Perhaps if trial judges more assiduously followed the prescription of Rule 54(d), defendants would have no need to use Rule 68 in cases, as the instant one, which are viewed as and ultimately found to be baseless. Unfortunately, the trend appears to be toward the sort of unexplicated award given by the trial judge below: that even though defendant prevailed it had to bear its own litigation costs.[5]

This result was upheld by the same panel of the Seventh Circuit which found that plaintiff's evidence of discrimination was "superficial, incomplete, inadequate or otherwise defective. The evidence failed to establish that [plaintiff] was treated differently than similarly situated whites." (J.A. A16). Further, this panel of the Seventh Circuit held that "[r]egardless of the deficiencies of the plaintiff's evidence, the defendant strongly defended the action with a non-discriminatory explanation . . . . The record suggests considerable company forebearance without regard to the employee's race." (J.A. A16-18).

It is precisely this kind of case which compels a mandatory application of Rule 68; one that is without merit but not quite (according to the lower courts) "frivolous". (J.A. A12, A18). Defendants need protection against litigious plaintiffs with baseless, if not frivolous, claims; protection that is not being uniformly provided by the judiciary.

[5] Delta has attached as an appendix to this brief its review of all reported decisions found in BNA's Fair Employment Cases covering the most recent five volumes, in cases where cost awards were mentioned and where defendant prevailed. (Pet. Reply Br. App. at 1a-9a). This review shows that all too often the courts have left the completely innocent defendant burdened with the costs of the litigation. This Court would do well to admonish the lower courts to be more receptive and aware of the plight of the innocent defendant.

II.

NONE OF THE VARIOUS TECHNICAL OBJECTIONS TO DELTA'S OFFER ARE SUPPORTABLE

Respondent and *amici* present numerous technical objections to the form and manner of Delta's offer in the instant case. The arguments advanced, however, are self-repudiating and Delta will briefly treat such objections seriatim.

A.

Plaintiff Is Not Required To Prevail

Both Respondent and the Government contend that Rule 68 may only be used in instances where plaintiff actually prevails at trial, but in an amount less than that offered (Resp. Br. at 14-19; Gov't Br. at 11). The Government's insistence on this position is reminiscent of the "whose ox is being gored" theory of justice,[6] since it was the Government as defendant in *Dual* v. *Cleland*, 79 FRD 696 (D.D.C. 1978) which pursuaded Judge Richey to vacate his order that "each party bear its own costs" in light of its Rule 68 offer.[7] In *Dual*, the court had dismissed plaintiff's Title VII claim against the United States Veterans Administration and awarded judgment to defendant.

Irrespective of the Government's duplicity, the argument is not supported by logic, the language of the rule or prior case precedent. Indeed, the only support relied upon by Respondent and *amici* is a comment written by a law student. (Resp. Br. at 14; Gov't Br. at 15).

[6] *See* A. Bickel, The Morality of Consent 133 (1975).

[7] A reproduced certified copy of the Government's motion to award costs pursuant to Rule 68, together with plaintiff's memorandum in opposition, is set forth in the Appendix to this brief. (Pet. Reply Br. App. at 10a-15a).

It is illogical to assume that the framers of the Federal Rules would have adopted a rule which protected guilty defendants against obdurate plaintiffs, but gave no such protection to innocent defendants. The language of the Rule, as initially written or as amended effective March 19, 1948, does not compel such a conclusion. To the contrary, it simply states the condition precedent to the mandatory cost-shifting, that plaintiff obtain less by judgment than that offered by defendant. It matters not whether the judgment is a dismissal of all claims or one in favor of plaintiff, the key is that it must be less favorable than that offered.[8]

Delta concedes that the case law is sparse with respect to prevailing defendants being awarded costs pursuant to Rule 68. But to paraphrase Justice Black, such silence is pregnant with significance. *See NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). No occasion arises for a prevailing defendant to request costs pursuant to its prior offer of judgment until the court has denied it costs, even though it prevailed. The fact that early state court decisions applying rules similar to Rule 68 involved cases where the plaintiff won something proves nothing if, in cases where defendant prevailed, such defendant was awarded costs without regard to any offer of judgment. It is only where, as appears to be the case all too often in Title VII litigation, the court imposes costs upon the prevailing defendant, that recourse to an offer of judgment rule becomes necessary.[9] Nevertheless, since the promulgation of Rule 68 in

[8] Respondent argues that Ms. August received no judgment (Resp. Br. at 14.) That contention is obviously erroneous. "Judgment" as the term is used in the Federal Rules of Civil Procedure is defined in Rule 54(a) to mean "a decree and any order from which an appeal lies." It is simply the term selected to refer to the court's decision. Accordingly, all parties in litigation obtain a "judgment" when the court renders its decision.

[9] Respondent tacitly concedes this point since it asserts that prior to the adoption of the Federal Rules, costs incurred by a prevailing party "were uniformly paid by the unsuccessful opponent." (Resp. Br. at 18).

1938, several federal courts, and the Seventh Circuit in the instant case, have accepted without question the use of a Rule 68 offer by a prevailing defendant. *See Truth Seeker Co.* v. *Durning*, 147 F.2d 54 (2d Cir. 1945); *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980); *Scheriff* v. *Beck*, 452 F.Supp. 1254 (D. Colo. 1978); *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978); *Mr. Hanger, Inc.*, v. *Cut Rate Plastic Hangers, Inc.* 63 F.R.D. 607 (E.D.N.Y. 1974); *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969).[10]

B.

The Offer Was Proper

The Government and other *amici* argue that Delta's offer was not proper because it restricted the amount of attorney's fees by including them as part of its $450. (Gov't Br. at 14; LCCR II Br. at 7.) The anomaly of such a proposition is self-evident. It would completely thwart the proper use of a Rule 68 offer in cases such as the instant one, where defendant has evaluated plaintiff's claim as meritless. It would compel a defendant to make an offer immediately upon receipt of a complaint, lest it be liable for unwarranted fees of discovery and pretrial proceedings. It would discourage settlement and encourage litigation for, as the suit developed (and arguably counsel became more aware of the lack of merit of the case), plaintiff's attorney's fees would steadily climb; there would be no incentive for defendant to settle a baseless claim by having to pay all of plaintiff's expenses. Indeed, the very uncertainty of the amount might well preclude any offers.

[10] *See also Miklautsch* v. *Dominick*, 452 P.2d 438, 440 (Alaska 1969) where the Supreme Court of Alaska, interpreting its Rule 68 (identical to Federal Rule 68), specifically held that its Rule 68 could be used "regardless of who is the prevailing party. . . ." *Id.* at 440.

Delta's offer was proper and consistent with the policies of both Title VII and Rule 68.[11] Delta offered to pay $450, which amount was to include attorney's fees; in addition, it would pay whatever regular costs had then accrued. The offer did not exclude attorney's fees, as in *Scheriff* v. *Beck*, *supra* at 1259; it merely set a fixed amount it was willing to pay.

A party wishing to settle an action, including a Title VII case, may surely select the amount for which it is willing to settle. The risk of Delta's approach is obvious in cases such as Title VII which provide for an award of attorney's fees, in the court's discretion, to a prevailing party. By including attorneys fees as part of the overall offer, a defendant must realize that if plaintiff prevails, the amount awarded as fees will be added to whatever relief is obtained in order to determine whether the offer was more favorable than the outcome. In this case the $450 offer, including attorney's fees, was clearly more favorable since plaintiff recovered no relief and no attorney's fees. To urge, as did the trial court and *amici* Government (J.A. A12; Gov't Br. at 15) that plaintiff's attorneys fees had exceeded the $450 offer is to ignore that plaintiff and her attorney must be aware that *no* legal fees would be forthcoming if plaintiff does not prevail. *See, e.g. Copeland* v. *Marshall*, ___ F.2d ___, 23 Fair Empl. Prac. Cases 967, 975 (D. C. Cir. 1980).

[11] It should be noted that at the time of its offer, May, 1977, Delta did not have the benefit of the cases relied upon by the Government (Gov't Br. at 13-14) in its attack on Delta's offer, *i.e. Scheriff* v. *Beck*, decided in 1978, *Christiansburg Garment Co.* v. *EEOC*, decided in 1978, *New York Gaslight Club, Inc.* v. *Carey*, decided in 1980, or *Maher* v. *Gagne*, decided in 1980. Delta submits that these cases do not alter the conclusion that its offer was, in any event, a proper one.

C.

The Lower Courts' Abuse Of Discretion Is An Issue

Respondent and *amici* argue that Delta cannot raise before this Court its claim that the lower courts abused their discretion by not awarding Delta its litigation costs (Resp. Br. at 22; Gov't. Br. at 26-27.). Such assertions are specious.

Delta has argued throughout these proceedings that to inject the court's discretion into Rule 68 renders it essentially duplicative of Rule 54(d) (Appellant's Brief before the Seventh Circuit at 9-10; Appellant's Petition for Rehearing and Suggestion for Hearing *En Banc* at 4.). Further, Delta has argued that under either the trial court's or the appellate court's standards, Delta should have been awarded its costs (Appellant's Petition for Rehearing and Suggestion for Hearing *En Banc* at 8-9.). Thus the question of the lower courts' abuse of their discretion, whether under Rule 54(d) or their redrafted versions of Rule 68, has been an issue throughout. Accordingly, it is entirely proper for this Court to consider the issue of abuse of discretion. *Cf. Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941).

D.

Delta's Offer Denied Liability

Amici Lawyers' Committee I and Lawyers' Committee II argue that Delta's offer was defective because it denied liability. (LCCR I Br. at 6, 10; LCCR II Br. at 10.) Such *amici* either misread or misapprehended both Delta's offer and Rule 68. The offer on its face allowed for judgment to be taken against Delta in the amount of $450, plus accrued costs. (Pet. App. at 34) If accepted, all that would have remained was for the clerk to enter judgment; a result to which Delta was obviously subjecting itself.

The last sentence of the offer indicated merely that the offer itself was not, outside of the operation of Rule 68, to be construed as an independent admission of liability which could be used against Delta if the offer was rejected. That is all that was intended, and as such the offer was entirely consistent with the operation of Rule 68.

Respectfully submitted,

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Appendix

APPENDIX TO REPLY BRIEF FOR PETITIONER

The following index is an analysis of decisions pertaining to the disposition of costs and attorney's fees in Title VII and 42 U.S.C. § 1981 employment discrimination cases where the defendant has prevailed. The index considers the decisions reported in Volumes 19-23 (inclusive of the October 18, 1980 reporter) of the BNA's Fair Employment Cases decided following this Court's opinion in *Christiansburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 418 (1978). The cases included represent reported decisions where the courts either expressly ordered or denied costs and attorney's fees.

I.

Decisions in Title VII and 42 U.S.C. § 1981 Cases where the defendant has prevailed and federal courts have held that each party should bear its own costs of litigation.

A.

VOLUME 19

1) *E.E.O.C.* v. *North Hills Passavant Hospital*, 466 F. Supp. 783, 19 FEP Cases 211 (W.D. Pa. 1979).

2) *Gilbert* v. *East Bay Municipal Utility District*, ___ F. Supp. ___, 19 FEP Cases 304 (N.D. Cal. 1979).

3) *Wilson* v. *Sharon Steel Corp.*, ___ F. Supp. ___, 19 FEP Cases 336 (W.D. Pa. 1979).

B.

VOLUME 20

4) *E.E.O.C.* v. *A.R.A. Manufacturing Co.*, ___ F. Supp. ___, 20 FEP Cases 1268 (N.D. Tex. 1979).

C.

VOLUME 21

5) *De Medina* v. *Reinhardt* ____ F. Supp. ____, 21 FEP Cases 75 (D.D.C. 1979)

6) *Martin* v. *Arkansas Arts Center*, 480 F. Supp. 156, 21 FEP Cases 560 (E.D. Ark. 1979)

7) *Delta Air Lines, Inc.* v. *August*, ____ F. Supp. ____, 21 FEP Cases 634 (N.D. Ill. 1978), *aff'd*, 600 F.2d. 699, 21 FEP Cases 642 (7th Cir. 1979), *cert. granted*, ____ U.S. ____, 100 S. Ct. 1833 (1980)

8) *Dual* v. *Cleland*, ____ F. Supp. ____, 21 FEP Cases 1721 (D.D.C. 1978), *modified*, 79 F.R.D. 696, 21 FEP Cases 1730 (D.D.C. 1978)

D.

VOLUME 22

9) *Cross* v. *U.S. Postal Service*, 483 F. Supp. 1050, 22 FEP Cases 9 (E.D. Mo. 1979)

10) *Jefferson* v. *H.K. Porter Co.*, 485 F. Supp. 356, 22 FEP Cases 53 (N.D. Ala. 1980)

11) *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 22 FEP Cases 281 (N.D. Cal. 1980)

12) *Satz* v. *I.T.T. Financial Corp.*, 464 F. Supp. 284, 22 FEP Cases 926 (E.D. Mo. 1980), *rev'd*, 619 F.2d. 738, 22 FEP Cases 929 (8th Cir. 1980)

13) *Claytor* v. *Howard University*, ____ F. Supp. ____, 22 FEP Cases 969 (D.D.C. 1978)

14) *Wooten* v. *N.Y. Telephone Co.*, 485 F. Supp. 748, 22 FEP Cases 1742 (S.D.N.Y. 1980)

E.

VOLUME 23

15) *Vinson* v. *Taylor*, ____ F. Supp. ____, 23 FEP Cases 37 (D.D.C. 1980)

16) *Harris* v. *Anaconda Aluminum Co.*, ____ F. Supp. ____, 23 FEP Cases 553 (N.D. Ga. 1979)

17) *Pettus* v. *Dow Badische Chemical Co.*, ____ F. Supp. ____, 23 FEP Cases 615 (S.D. Tex. 1980)

18) *Gupta* v. *International Business Machines Corp.*, ____ F. Supp. ____, 23 FEP Cases 857 (D. Md. 1980)

19) *Eng* v. *National Academy of Sciences*, ____ F. Supp. ____, 23 FEP Cases 862 (D.D.C. 1980)

20) *Fong* v. *American Airlines*, ____ F.2d ____, 23 FEP Cases 1168 (9th Cir. 1980)

21) *Schaulis* v. *CTB/McGraw Hill, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1185 (N.D. Cal. 1980)

22) *Hernadez* v. *Western Electric Company, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1244 (S.D. Tex. 1978)

23) *Panlilio* v. *Dallas Independent School District*, ____ F. Supp. ____, 23 FEP Cases 1573 (N.D. Tex. 1979)

24) *Gleiser* v. *Regents of the University of California*, ____ F. Supp. ____, 23 FEP Cases 1701 (N.D. Cal. 1980)

25) *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, ____ F. Supp. ____, 23 FEP Cases 1720 (D.N.J. 1980)

II.

Decisions in Title VII and 42 U.S.C. § 1981 cases where the defendant has prevailed and federal courts have held that defendant is entitled to litigation costs.

A.

VOLUME 19

1) *Mixon* v. *Hanley Industries, Inc.*, 454 F. Supp. 386, 19 FEP Cases 38 (E.D. Mo. 1978), *aff'd.*, 594 F.2d 869, 22 FEP Cases 62 (8th Cir. 1979)

2) *Johnson* v. *Baylor College of Medicine*, ____ F. Supp. ____, 19 FEP Cases 165 (S.D. Tex. 1979)

3) *Rice* v. *City of St. Louis*, 464 F. Supp. 138, 19 FEP Cases 197 (E.D. Mo. 1978), *aff'd*., 607 F.2d 791, 21 FEP Cases 81 (8th Cir. 1979)

4) *Hunter* v. *Shell Oil Co.*, ____ F. Supp. ____, 19 FEP Cases 350 (S.D. Tex. 1979)

5) *Women Employed* v. *Rinella & Rinella*, 468 F. Supp. 1123, 19 FEP Cases 712 (N.D. Ill. 1979)

6) *Kelly* v. *Atlantic Richfield Co.*, 468 F. Supp. 712, 19 FEP Cases 823 (E.D. Tex. 1979)

7) *Lanigan* v. *Bartlett & Co. Grain*, 466 F. Supp. 1388, 19 FEP Cases 1039 (W.D. Mo. 1979)

8) *Anderson* v. *United States Steel Corp.*, ____ F. Supp. ____, 19 FEP Cases 1215 (N.D. Cal. 1979)

9) *McGee* v. *Stauffer Chemical Co.*, ____ F. Supp. ____, 19 FEP Cases 1292 (S.D. Tex. 1978)

10) *Rhoades* v. *Jim Dandy Co.*, ____ F. Supp. ____, 19 FEP Cases 1564 (N.D. Ala. 1978)

B.

VOLUME 20

11) *Brown* v. *General Motors Corp.*, ____ F. Supp. ____, 20 FEP Cases 88 (W.D. Mo. 1978), *Rev'd*. 601 F.2d 956, 20 FEP Cases 94 (8th Cir. 1979)

12) *McMillan* v. *Central Freight Lines, Inc.*, ____ F. Supp. ____, 20 FEP Cases 165 (N.D. Tex. 1979)

13) *Harris* v. *Ralston Purina*, 471 F. Supp. 405, 20 FEP Cases 166 (D. Col. 1979)

14) *Walker* v. *Xerox Corp.*, 472 F. Supp. 451, 20 FEP Cases 278 (E.D. Mo. 1979)

15) *Smith* v. *Amoco Chemicals Corp.*, ____ F. Supp. ____, 20 FEP Cases 724 (S.D. Tex. 1979)

16) *Hendricks* v. *Solomon*, 474 F. Supp. 280, 20 FEP Cases 1176 (E.D. Mo. 1979)

17) *Booth* v. *Board of Directors, National American Bank*, 475 F. Supp. 638, 20 FEP Cases 1270 (E.D. La. 1979)

18) *Wheeler* v. *Armco Steel Corp.*, 471 F. Supp. 1050, 20 FEP Cases 1594 (S.D. Tex. 1979)

19) *Edmondson* v. *United States Steel Corp.*, ____ F. Supp. ____, 20 FEP Cases 1745 (N.D. Ala. 1979)

C.

VOLUME 21

20) *Nellis* v. *Sunshine Dairy*, ____ F. Supp. ____, 21 FEP Cases 327 (D. Ore. 1979)

21) *Robinson* v. *E.I. duPont de Nemours & Co.*, ____ F. Supp. ____, 21 FEP Cases 373 (D.S.C. 1979)

22) *Neidhardt* v. *D.H. Holmes Co.*, ____ F. Supp. ____, 21 FEP Cases 452 (E.D. La. 1979)

23) *Holman* v. *Anchor Distributors, Inc.*, 472 F. Supp. 361, 21 FEP Cases 670 (E.D. Mo. 1979)

24) *E.E.O.C.* v. *Sheet Metal Workers, Local 122*, 463 F. Supp. 388, 21 FEP Cases 936 (D. Md. 1978)

25) *Bauernfeind* v. *Village Inn Pancake House, Inc.*, ____ F. Supp. ____, 21 FEP Cases 1003 (D. Colo. 1979)

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26) *Setser* v. *Novack Investment Co.*, 483 F. Supp. 1147, 22 FEP Cases 96 (E.D. Mo. 1980)

27) *Edwards* v. *I.T.T. American Electric*, ____ F. Supp. ____, 22 FEP Cases 107 (N.D. Miss. 1979)

28) *Owings* v. *City of Houston*, ____ F. Supp. ____, 22 FEP Cases 167 (S.D. Tex. 1979)

29) *Belgarde* v. *H.C. Smith Construction Co.*, 483 F. Supp. 1334, 22 FEP Cases 244 (D.N.D. 1980)

30) *Pegues* v. *Mississippi State Employment Service*, ____ F. Supp. ____, 22 FEP Cases 392 (N.D. Miss. 1980)

31) *Salge* v. *Silver Burdett Co.*, ____ F. Supp. ____, 22 FEP Cases 818 (S.D. Ind. 1980)

32) *Mosley* v. *St. Louis Southwestern Ry. Co.*, ____ F. Supp. ____, 22 FEP Cases 835 (E.D. Tex. 1980)

33) *Kirk* v. *Feld Truck Rental, Inc.*, ____ F. Supp. ____, 22 FEP Cases 843 (N.D. Ga. 1979)

34) *Rosser* v. *Laborers, Local 438*, ____ F. Supp. ____, 22 FEP Cases 1271 (N.D. Ga. 1978), *aff'd*, 616 F.2d. 221, 22 FEP Cases 1274 (5th Cir. 1980)

35) *Wright* v. *Allis-Chalmers*, ____ F. Supp. ____, 22 FEP Cases 1303 (N.D. Ala. 1980)

36) *Smith* v. *Bailar*, ____ F. Supp. ____, 22 FEP Cases 1378 (N.D. Ga. 1980)

37) *Joshi* v. *Florida State University*, 486 F. Supp. 86, 22 FEP Cases 1533 (N.D. Fla. 1980)

38) *E.E.O.C.* v. *Oklahoma Packers Hide Co.*, ____ F. Supp. ____, 22 FEP Cases 1547 (W.D. Okla. 1980)

39) *Underwood* v. *Jefferson Memorial Hospital*, 484 F. Supp. 1040, 22 FEP Cases 1641 (E.D. Mo. 1980)

40) *Ragan* v. *Portland Superintending School Committee*, ____ F. Supp. ____, 22 FEP Cases 1768 (D. Me. 1979)

41) *Curran* v. *Portland Superintending School Committee*, ____ F. Supp. ____, 22 FEP Cases 1777 (D. Me. 1979)

42) *Lacy* v. *Chrysler Corp.*, ____ F. Supp. ____, 22 FEP Cases 1825 (E.D. Mo. 1980)

43) *Heyman* v. *Tetra Plastics, Inc.*, 482 F. Supp. 510, 22 FEP Cases 1829 (E.D. Mo. 1979)

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44) *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, ____ F. Supp. ____, 23 FEP Cases 177 (N.D. Ill. 1980)

45) *Carroll* v. *United Steelworkers of America, AFL-CIO*, ____ F. Supp. ____, 23 FEP Cases 238 (D. Md. 1980)

46) *Greene* v. *Associated Air Freight, Inc.*, ____ F. Supp. ____, 23 FEP Cases 544 (E.D. Ky. 1980)

47) *Patterson* v. *General Motors Corp.*, ____ F. Supp. ____, 23 FEP Cases 888 (N.D. Ill. 1978), *aff'd* ____ F.2d. ____, 23 FEP Cases 894 (7th Cir. 1980)

48) *Alpa* v. *Western Air Lines*, ____ F. Supp. ____, 23 FEP Cases 1042 (N.D. Cal. 1979)

49) *Buckner* v. *Cameron Iron Works, Inc.*, ____ F. Supp. ____, 23 FEP Cases 1092 (S.D. Tex. 1979)

50) *Tortorici* v. *Secretary of Health, Education, and Welfare*, ____ F. Supp. ____, 23 FEP Cases 1284 (N.D. Ala. 1979)

51) *Boulden* v. *Bolger*, ____ F. Supp. ____, 23 FEP Cases 1491 (D.N.J. 1980)

52) *Laborde* v. *Regents of the University of California*, ____ F. Supp. ____, 23 FEP Cases 1661 (C.D. Cal. 1980)

III.

Decisions in Title VII and 42 U.S.C. § 1981 cases where the defendant has prevailed and federal courts have awarded both attorney's fees and costs to defendant.

A.

VOLUME 19

1) *Brown* v. *Lakeside Country Club*, ____F.Supp. ____, 19 FEP Cases 796 (S.D. Tex. 1979)

2) *Davis* v. *Braniff Airways, Inc.* 468 F.Supp. 10, 19 FEP Cases 811 (N.D. Tex. 1979)

3) *Moss* v. *ITT Continental Baking Co.*, 468 F.Supp. 420, 19 FEP Cases 861 (E.D. Va. 1979)

4) *Bowers* v. *Kraft Foods Corp.*, 467 F.Supp. 971, 19 FEP Cases 934 (E.D. Mo. 1979)

B.

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5) *Wheeler* v. *Anchor Continental, Inc.* ____ F.Supp. ____, 20 FEP Cases 591 (D.S.C. 1978)

6) *Miller* v. *Andrews Bearing Corp.*, ____F.Supp. ____, 20 FEP Cases 635 (D.S.C. 1979)

7) *Faraci* v. *Hickey-Freeman, Inc.*, 607 F.2d 1025, 20 FEP Cases 1777 (2d Cir. 1979)

8) *Johnson* v. *Weed Eaters*, ____ F. Supp. ____, 20 FEP Cases 1782 (S.D. Tex. 1979)

C.

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9) *Flora* v. *Moore*, 461 F.Supp. 1104, 21 FEP Cases 298 (N.D. Miss. 1978)

10) *EEOC* v. *American National Bank*, ____F.Supp. ____, 21 FEP Cases 1595 (E.D.Va. 1979)

D.

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11) *Jeremiah* v. *United Technologies Corp.*, ____ F.Supp.____ 22 FEP Cases 152 (D. Conn. 1980)

12) *EEOC* v. *First National Bank of Jackson*, ____ F.Supp.____, 22 FEP Cases 696 (S.D. Miss. 1978)

13) *EEOC* v. *Brookhaven Bank & Trust Co.*, ____ F.Supp.____, 22 FEP Cases 699 (S.D. Miss. 1978), *rev'd*, 614 F.2d 1022, 22 FEP Cases 703 (5th Cir. 1980)

14) *Obin* v. *District No. 9, International Association of Machinists and Aerospace Workers*, 487 F.Supp. 368, 22 FEP Cases 815 (E.D. Mo. 1980)

15) *Fisher* v. *Fashion Institute of Technology*, ____ F.Supp.____, 22 FEP Cases 1163 (S.D.N.Y. 1980)

16) *Harris* v. *Plastics Manufacturing Co.*, 617 F.2d 438, 22 FEP Cases 1536 (5th Cir. 1980)

E.

VOLUME 23

17) *Reed* v. *Sisters of Charity of the Incarnate World of Louisiana, Inc.*, ____F.Supp.____, 23 FEP Cases 1171 (W.D. La. 1978)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY DUAL, *Plaintiff*	Civil Action No. 76-0015
MAX CLELAND, *Defendant*	

MOTION TO AMEND JUDGMENT TO AWARD COSTS TO DEFENDANT

Pursuant to Rules 59 and 68, Federal Rules of Civil Procedure, defendant respectfully moves this Court to amend its Order of July 25, 1977, so as to provide that plaintiff shall pay to defendant his costs which were incurred after May 24, 1978, the date on which defendant made a settlement "offer of judgment" which included a cash payment to plaintiff, which plaintiff rejected.

In support of this motion, defendant submits herewith a memorandum of points and authorities and a proposed order.

Respectfully submitted,

EARL J. SILBERT
Earl J. Silbert
United States Attorney

ROBERT N. FORD
Robert N. Ford
Assistant United States Attorney

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion To Amend Judgment To Award Costs To Defendant, memorandum of points and authorities in support and proposed order has been made, this 2nd day of August, 1978, upon counsel for plaintiff, by mailing a copy thereof to:

Gary H. Simpson, Esquire
4720 Montgomery Avenue
Suite 407
Bethesda, Maryland 20014

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney
U.S. Courthouse
Room 3431
Washington, D.C. 20001
(202) 426-7121

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY BEAL, *Plaintiff*,
v.
MAX CLELAND, *Defendant*.
Civil Action No. 76-0015

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO AMEND ORDER AND AWARD COSTS

This matter came on for trial on plaintiff's claims of discrimination and reprisal under 42 U.S.C. § 2000e-16. A final judgment was entered in favor of defendant on July 25, 1978.

In an effort to resolve this dispute involving a former federal employee and cognizant of litigation risks inherent in every case where significant credibility issues are present, defendant made a settlement offer to plaintiff. The settlement offer was ultimately made in the form of an offer of judgment pursuant to Rule 68, Federal Rules of Civil Procedure and was served on May 24, 1978. Trial commenced on June 5, 1978. While the precise details of the offer need not be set forth here, it is undisputed that the offer of judgment included some relief *i.e.* money to be paid to the plaintiff—and plaintiff ultimately received no relief.[12]

[12] To preserve the confidentiality of settlement negotiations, defendant has not, by agreement of plaintiff's counsel, attached the offer or described its exact terms. It is defendant's understanding (from a telephone conversation with plaintiff's counsel) that plaintiff will stipulate that the offer of judgment was made more than ten (10) days before trial and that it was more favorable than that ultimately received by plaintiff in the action. If this stipulation is not forthcoming, defendant will submit a copy of the offer to the Court in support of this motion.

Rule 68, Federal Rules of Civil Procedure, provides that:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued .... An offer not accepted shall be deemed withdrawn .... If the judgment finally obtained by the offeree is not more than the offer, the offeree *must* pay the costs incurred after the making of the offer.

Defendant incurred the expense of witness travel and *per diem* after the offer. While defendant has not yet calculated the amount of costs,[13] defendant submits its entitlement to costs is clear under Rule 68.

WHEREFORE, it is respectfully requested that this Court amend its July 25, 1978, Order to award costs to defendant in an amount to be set by subsequent court order or agreement.

Respectfully submitted,

EARL J. SILBERT
Earl J. Silbert
United States Attorney

ROBERT N. FORD
Robert N. Ford
Assistant United States Attorney

KAREN I. WARD
Karen I. Ward
Assistant United States Attorney

[13] Defendant believed this motion to be governed by Rule 59, F.R.C.P. since the costs determination was part of the final order. Consequently, this motion was due within 10 days, and defendant has been unable to compute costs yet.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY DUAL, *Plaintiff*	Civil Action No. 76-0005
v.	
MAX CLELAND, *Defendant.*	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 59(e) TO MODIFY

The Defendant has filed a Motion under Federal Rules of Civil Procedure 59(e) to Modify this Court's Judgment to cause the costs of this proceeding be assessed against the Plaintiff. This Motion is specifically designed to cause these costs incurred by the Defendant after its Offer of Judgment under Rule 68 to be assessed against the Plaintiff.

The Plaintiff submits that such a modification would not be in the best interest of justice. She had a good faith claim (specifically as it related to retaliation) and incurred great expenses on her own in pursuing this matter.

GARY HOWARD SIMPSON

Gary Howard Simpson
Attorney for Plaintiff
4720 Montgomery Lane, Suite 407
Bethesda, Maryland 20014
Telephone: (301) 656-7013

POINTS AND AUTHORITIES

Rule 59(e), Federal Rules of Civil Procedure

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 1978, a copy of the foregoing Opposition was mailed via ordinary mail, postage prepaid, addressed to Earl J. Silbert, Esq., U.S. Attorney, Robert N. Ford, Esq., Assistant U.S. Attorney and Karen I Ward, Esq., Assistant U.S. Attorney, U.S. Courthouse, Room 3431, Washington, D.C. 20001.

GARY HOWARD SIMPSON

Gary Howard Simpson

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
536 SOUTH CLARK STREET
CHICAGO, ILLINOIS 60605
TELEPHONE: 353-2713

IN REPLY REF

SETTLEMENT AGREEMENT

1. In exchange for the promises made by contained in paragraph (2) of this Agreement, agrees not to institute a lawsuit under Title VII of the Civil Rights Act of 1964 based on Charge Number filed with the Equal Employment Opportunity Commission, and the Equal Employment Opportunity Commission agrees not to use this charge as the jurisdictional basis for a civil action under Section 706(f)(1) of Title VII.

2. In exchange for the promises of and the Equal Employment Opportunity Commission contained in paragraph (1) of this agreement, the agrees:

3. This agreement constitutes the complete understanding between the Respondent, Charging Party and the Equal Employment Opportunity Commission. No other promises or agreements shall be binding unless signed by these parties.

4. It is understood that this agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act.

5. The Respondent agrees to provide written notice to the EOS, of the Chicago District Office within 10 days of satisfying each obligation specified at paragraph (2) of this agreement.

6. These parties agree that this agreement may be used as evidence in a subsequent proceeding in which any of the parties allege a breach of this agreement.

7. The Equal Employment Opportunity Commission's participation in this agreement does not reflect any judgment by the Commission on the merits of the charge. Furthermore, the Equal Employment Commission does not waive or in any manner limit its right to process or seek relief in any other charge, including but not limited to a charge filed by a member of the Commission against the Respondent.

_____ _____
Respondent

_____ _____
Charging Party

On behalf of the Commission:

_____ _____
Acting Director
Chicago District Office

END OF CASE